# APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 15719 and 15720

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK AMERICA'S PHONE-ORDER FLORISTS, INC., a corporation, *Plaintiff-Appellant,* (Cross Appellee)

vs.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, a corporation, *Defendant-Appellee,* (Cross Appellant).

**Defendant-Appellee's Response to Memorandum of the United States**

This case has been in litigation five years. It has been concerned solely with the propriety of three rules adopted by the defendant Association, following their submission to—and advance clearance by—the Antitrust Division of the Department of Justice.

On the eve of oral argument in this Court, the United States, for the first time, has seen fit to express itself concerning its prior action on those rules—by a memorandum mailed to the Court and the parties on November 23, 1966. However, we welcome this belated submission of the United States.

The substance of the Government's memorandum is a mere quibble whether the Antitrust Division's unqualified statement that the rules were unobjectionable constituted "an 'approval' of the rules." This is a matter of semantics. There is no suggestion that the Antitrust Division disputes its "*clearance*" of the rules.

In fact, the Government's memorandum corroborates conclusively the fact that Defendant-Appellee submitted the rules for advance "clearance" by the United States (D. Br., Supp. I at p. 54). It likewise confirms the facts

that the Antitrust Division—with full notice of the content of those rules—categorically advised it "ha[d] no objections" to them; further stated that it would "take no action under" the previously entered consent decree, "in opposition to" those rules; and additionally expressed its "trust" that the clearance "will be of assistance" to the defendant Association.

In sum, the effect of the Government's belated memorandum is to eliminate any possible controversy concerning FTD's good faith reliance on the Government's assurances before it adopted the rules in question and the Government's unequivocal "clearance" of those rules.

Unless a private citizen is entitled to rely on such a clearance, what function does the clearance procedure serve? Unless such reliance is permissible, the clearance procedure becomes a trap for the well-meaning citizen who invokes the Government's advice. As this Court has recognized, when "[T]he United States has given its word, it should . . . keep it" *F.T.C.* v. *Dilger*, 276 F. 2d 739, 744 (7th Cir. 1960); cert. denied 364 U.S. 882 (1960).

Indeed, this 11th-hour memorandum of the United States highlights the irony of this whole case. The long and short of it is that defendant Association has been sued here for its good faith reliance on the Government's advice. The record is clear that the rules would never have been promulgated if the Government had disapproved them (Pl. App. Vol. I, 148, 153 and Vol. II, 369, 416). The submission of the rules to the Antitrust Division attests to the Association's good faith in adopting them.

We note further that the Government's memorandum is mistaken in its present representation—to this Court—that the Antitrust Division's consideration of the rules was made only

> "for the purpose of determining whether it should object to them under the consent decree."

This is not so. In submitting the rules—in full text—for "clearance" by the Antitrust Division, defendant Association's counsel stated (D. Br., Supp. I, at p. 54):

> "We hope that your department will agree with us that the proposed rules do not in any way conflict with the terms of the Final Judgment of June 1, 1956, *and that they are not contrary to any of the various statutes which you administer and enforce.*" (Emphasis supplied)

The Antitrust Division's response discloses full appreciation of the scope of the request and the scope of the resultant clearance. The Government's response stated (D. Br., p. 11):

> "In reply, I wish to advise you that the Antitrust Division of the Department of Justice *has no objection* to the proposed additions at the end of Membership Rules 1 and 3 or to the proposed addition of new Membership Rule 16. *Further,* the Division will take no action under the Final Judgment in opposition to said proposed amendments." (Emphasis supplied)

The truth of the matter is that the Government's description of itself as an *amicus curiae* is misleading. The Government is not a disinterested party. As the plaintiff noted in its answer brief (p. 9), in a transparent effort to prejudice defendant, the United States has a recently-filed untried complaint against this same defendant pending in the United States District Court in Detroit. The Government memorandum—as purported *amicus curiae*—is an equally transparent attempt to induce this Court to prejudice the defense of the Detroit action.

Finally, regarding the full disclosure which accompanied the submission of the rules for clearance by the Antitrust Division, we again invite the Court to read the letter of FTD's counsel to the Assistant Attorney General, Antitrust Division. (This appears in full at pp. 50-54, inclusive, of Defendant-Appellee's original brief and argument.)